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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Louis Dabney Smith, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The questions presented by this petition upon the issues raised in the courts below have neither been decided nor foreclosed by the decision in *Falbo* v. *United States*, 320 U. S. 549. Indeed the dictum in *Billings* v. *Truesdell*, 321 U. S. 542, 558-559 supports the substantial question here presented, namely, whether petitioner, who has completed the selective process by acceptance on a preinduction physical examination and who is charged by indictment with refusal to report for induction into the armed forces pur-

suant to the Selective Training and Service Act may show, in defense to the indictment, that the orders on which the charges are based are void, illegal and contrary to law. If the Act and the Regulations are construed so as to require a registrant, who is exempt from all training and service, to report for induction as a condition precedent for obtaining judicial review of the illegality of the administrative orders, that the Act and Regulations are unconstitutional. None of these issues were presented in the *Falbo* case. Furthermore, the facts in this case are entirely different. Here the petitioner has completely exhausted all administrative remedies by acceptance following his pre-induction physical examination by the armed forces.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this Court. [ ]* The entire opinion appears also as an *appendix* of this petition.

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. *Timeliness of this Petition.*

The decision of the Circuit Court of Appeals was entered on April 4, 1945. The judgment of the court below became final on April 4, 1945.

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C., Appendix ss. 301-318) are drawn in question here, together

* Figures appearing in brackets throughout this petition and the supporting brief refer to pages of the printed transcript of the record.

with Sections 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 629.1-629.35, 633.2, 633.21, 642.41 and 642.42 of the Selective Service Regulations* (32 C. F. R. Supp., 601.5 et seq.) promulgated by the President under said Act.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

1. Does petitioner's failure to report to his local board at the time specified in the order of induction become immaterial in light of the conceded fact that he subsequently appeared at the induction station, joined with the group of inductees sent there from his local board, submitted to the final physical examination, was accepted by the armed forces and was granted a furlough and subsequently court-martialed for failure to perform military duty?

2. Does the conceded fact that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board for induction, constitute a valid defense to the indictment charging him with criminal failure to appear at the local board?

3. Did the appearance of petitioner at the induction station, pursuant to the order to report, and his failure to submit to induction constitute a failure to report for induction within the meaning of the Act and Regulations?

4. Did the intent on the part of petitioner not to report for induction justify the conviction in spite of the fact that

* The Regulations are amended frequently. The sections are here set out as they existed when the facts in controversy took place.

he was imprisoned at the time he was required to report and later appeared at the induction station and submitted to the administrative process up to the point of refusal to submit to induction?

5. Did the trial court err in charging the jury that petitioner's appearance at the induction station and acceptance by the armed forces, as well as petitioner's contentions that he was falsely imprisoned, were immaterial?

6. Did the trial court err in refusing to allow petitioner the right to show, and in refusing to permit the jury to consider, the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

7. Did the trial court err in charging the jury that it could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided by the jury to whether or not petitioner knowingly failed to report at the local board as specified in the induction order?

8. Did the trial court err in refusing to give petitioner requested charges permitting the jury to consider whether or not the boards had acted in an illegal and unconstitutional manner in classifying petitioner and in ordering him to report for induction?

9. Does acceptance by the armed forces at the induction station complete the administrative process so as to permit judicial review of the illegal classification in defense to the indictment based on petitioner's failure to report at the local board as specified in the induction order?

Statement of the Case

FORM OF ACTION

This criminal action was begun by indictment returned against petitioner, Louis Dabney Smith, in the United States District Court of the Eastern District of South Carolina, Columbia Division, on November 7, 1944. [2] Defendant was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940, as amended, and the Regulations promulgated thereunder, in that he "unlawfully, knowingly and wilfully failed and neglected to . . . report for induction as ordered by the said local board."

Petitioner urged a plea in bar, which was denied. He then urged a motion to quash [3-5] which was denied. [5] Upon a plea of "not guilty" [6] trial to a jury began on November 9, 1944, before the Honorable George Bell Timmerman, United States District Judge. At the close of all the evidence, petitioner moved for a directed verdict of "not guilty", in which the reasons were extensively stated. [25-28] On denial thereof, petitioner duly excepted. At the close of all the evidence, petitioner submitted to the court his requested charges, [35-38] Counsel summed up the evidence and the court charged the jury. [28-40] Petitioner objected and excepted to the court's charge. [40-41] The court refused certain of petitioner's requested charges with exceptions to petitioner. [35-41] The jury returned a verdict of "guilty". [41] Thereafter, on November 10, 1944, petitioner was sentenced to three and one-half years and committed to the custody of the Attorney General for confinement in a federal institution. [1]

FACTS

Louis Dabney Smith is a minister of Jehovah's witnesses and has been for several years. [9] For four years prior to the filing of his Selective Service questionnaire, he had been a minister preaching from house to house in the same manner as did Christ Jesus and His apostles, as shown at Acts 20: 20 and Luke 8: 1. He had been formally ordained. The record also disclosed that he was eighteen years of age on October 4, 1942; that he registered with his local board during the week of December 18, 1942; filed his questionnaire with which he submitted proof of his ministry; that he was living with his parents, receiving support from them; and that he was a student at the University of South Carolina.

After considering the evidence, the local board placed him in Class I-A on April 2, 1943. He was granted a personal appearance before the board, and on May 18, 1943, the local board continued his I-A classification. On May 25, 1943, he appealed for class IV-D to the board of appeal, and on June 17, 1943, such board affirmed the classification by a vote of 4 to 1. On June 22, 1943, he appealed to the President and the classification was affirmed. On September 18, 1943, he was ordered to report for induction on September 30, 1943. [7]

Petitioner's father suspected that he might be planning to refuse to report for induction on September 30, 1943, [22, 23] and about three days prior thereto he went to the local board and asked that the board have two detectives come to his home and take the petitioner to the induction station, but was advised that the local board had no police authority. [22] Thereupon, the father paid several local police officers (Magistrate Ollie Mefford and Constables Hough and Thornton) a sum of money to forcibly take petitioner to Fort Jackson, South Carolina, on September 30, 1943, and there deliver him for induction. [23]

On the morning of September 30, 1943, at 8 a.m., Magis-

trate Mefford and Constables Hough and Thornton drove up in the driveway of the Smith home. Petitioner's mother saw them as they got out of the car and started toward the house. [24] She ran upstairs to the bathroom where petitioner was shaving and preparing to dress, and by the time she reached there, the three men had entered the home and were behind her. [11] When petitioner came out of the bathroom, he asked the men if they had a warrant for his arrest, and they told him that they needed no warrant. One of the men pulled up his coat and displayed a pistol and commanded petitioner to accompany them. [12] Thinking they were federal agents, and that he was under arrest and in their custody petitioner surrendered himself to them. [12]

Magistrate Mefford and Constables Hough and Thornton placed petitioner in their car and drove him to the induction station at Fort Jackson, where they turned him over to the military authorities. [12-13] Petitioner told the authorities that he was a minister of the gospel and had been wrongly classified. [13, 15] The sergeant at the desk at the induction station then telephoned Mr. Leonard, the clerk of the local board, verified petitioner's classification and advised the clerk that petitioner was then at the induction station. [13] He asked the clerk if petitioner was supposed to be inducted into the army that day. The petitioner was asked by counsel, "What did Mr. Leonard have to say? A. He told me that Mr. Leonard said I was supposed to be inducted into the army that day. Q. And did he say that he should send you back over to the Board to be transported back to Fort Jackson? A. No sir." [14]

Petitioner was then taken to another building at the fort, where he awaited the arrival of the other men from the induction center. [14] He was then put with this group of men and given a final physical examination in due course. He remained with this group until he was advised that he had passed the physical examination and was declared

acceptable by the armed forces. He then went to the sergeant and advised him that he had not taken the oath and would continue to refuse to submit to it and would not put on the uniform. [16] Thereupon the sergeant read to petitioner the Articles of War covering men who refused to take the oath and advised him that regardless of whether he took the oath or not, he was subject to the Articles of War and in the army. [16] Petitioner still refused to take the oath and submit to induction and was again advised that he was subject to the Articles of War. [17] He was permitted to leave Fort Jackson on October 1, 1943, and received orders to report back in 21 days. [17] At the end of the 21 days he returned to the Fort and asked permission to see the commanding officer at the reception center. [18] He saw the officer and told him that he was a minister of Jehovah's witnesses; that he was deprived of a IV-D classification because of prejudice on the part of the local board [18]; that he was brought to the induction station against his will, and desired to be released. He was advised that he would not be released, whereupon petitioner told the officer that his obligation and mission in life was the preaching of the gospel of God's Kingdom, and that he had so consecrated his life to do the will of Almighty God. [19] Petitioner was then taken to the infirmary and then, on his refusal to don the uniform, the officers in charge attempted to force the uniform on him. [19] For disobeying the orders of the sergeant and other officers, he was charged with violating the Articles of War, court-martialed and sentenced to serve 25 years in prison. [19]

Thereafter, petitioner filed in the United States District Court in the Eastern District of South Carolina, a petition for writ of habeas corpus, alleging that the court-martial's judgment was entered without jurisdiction, since petitioner was not legally inducted into the army, not having subscribed to the formal military oath. On January 27, 1944, the United States District Court discharged the petition

for the writ and remanded petitioner to custody of the military authorities. (*Smith* v. *Richart, Colonel,* 53 F. Supp. 582)

Petitioner thereupon appealed to the Circuit Court (No. 5237, April Term 1944). While said appeal was pending, the Supreme Court of the United States in *Billings* v. *Truesdell,* 321 U. S. 542, held that military jurisdiction did not begin, under the existing Regulations, until the registrant had submitted to the oath of induction. Counsel then stipulated for a reversal of the judgment of the United States District Court and, on April 18, 1944, Judge John J. Parker accordingly entered a judgment reversing the United States District Court on the authority of the *Billings* decision and remanding the case to the United States District Court. Petitioner was thereafter released from military custody, and soon thereafter this criminal proceeding was instituted.

HOW ISSUES RAISED

By a plea in bar, defendant urged (1) that he did report to the induction station at Fort Jackson, where he was received by the army on the date specified in the induction order; (2) that he thereafter applied for and on December 9, 1943, obtained from the United States Courts, a writ of habeas corpus ordering his discharge from the army, said writ effecting his release on April 29, 1944; (3) that in issuing said writ of habeas corpus, the District Court held that defendant had reported for induction in obedience to the order of his board and that for this reason the issue was res judicata. This plea was overruled.

By motion to quash, defendant claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and order made by the draft boards. [3-4] He contended that if the right to urge this defense was denied him, a construction had been placed on the Act and Regulations

which made them unconstitutional. [4] Petitioner alleged that they were void because (1) they constituted a Bill of Attainder, contrary to clause 3 in section 9 of Article I of the Constitution; (2) surrendered the judicial powers to the draft board, contrary to Article III of the Constitution; (3) denied the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment to the Constitution; (4) denied the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Sixth Amendment to the Constitution; (5) permitted conviction without evidence of guilt and upon hearsay evidence and denied right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments to the Constitution. [4] The court overruled the motion to quash. [5]

At the close of all the evidence, petitioner moved for a directed verdict on the grounds that the evidence showed that he was not guilty of violating the Act in that he did report at the induction station as ordered, thereby rendering immaterial his failure to report at the local board. The reasons asserted in the motion to quash were reiterated in the motion for directed verdict. [25-27]

The court charged the jury that (1) the evidence showing that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board and that he had appeared at the induction station and was accepted for military service, was immaterial to the issues in the case (thus in effect instructing the jury to find petitioner guilty) [32, 40-41]; (2) the classification made by the boards was binding upon petitioner, the court and jury [33]; (3) petitioner's failure to appear at the local board was a violation of the Act. [32, 33, 35] Petitioner's exceptions to such charge were duly noted. [40, 41]

Petitioner's requested charges urging that the classifica-

tion and order thereon were illegal and void, and requesting the submission to the jury of the issue of his false imprisonment at the time he was scheduled to report at the local board were refused, with exceptions to the petitioner. [35, 36, 37, 40] The requests, in the terms of the Act and Regulations, defined what constitutes a regular and duly ordained minister of religion. [36, 37] Also the requests stated the duties of the draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. The court was requested to instruct the jury that if the jury found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses, and there was no substantial evidence that he was not such minister as claimed, the jury could find that the draft boards acted in excess of authority; without justification; contrary to law; without support of substantial evidence; contrary to the undisputed evidence; contrary to the Constitution, the Act and Regulations; and arbitrarily and capriciously; thereby rendering a verdict of "not guilty" if they so found. [37] Petitioner excepted to the court's charge as a whole for failure to charge as requested in defendant's requested instructions. [40]

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied on for Granting the Writ

The court below has decided that forcible restraint of petitioner at the time he was required to appear at the board was no defense to an indictment charging him with failure to report because he intended not to comply with the order. Moreover, the court below held that substantial

compliance with the order to report by appearance at the induction station, undergoing the physical examination that completed the selective process, and his subsequent refusal to be inducted was not a defense to an indictment charging him with failure to report for induction. The court below held that one who refuses to submit to induction is guilty of failing to report for induction, in spite of the fact that this court has said that failure to submit to induction is equally an offense under the Act as is failure to report for induction. (*Billings* v. *Truesdell*, 321 U. S. 542) Despite the fact that failure to report for induction is a different offense under the Act—one distinct from the offense of failure to submit to induction—the court below has held that the offenses are the same. The court holds that failure to submit to induction is failure to report for induction. This anomalous decision makes a dragnet out of an indictment charging one with failure to report for induction. Hence a person thus indicted under the Act would believe that he would be put to trial for failure to appear at the board, and upon the trial would find that he was being tried, not for failure to appear but for his failure to comply with some order or command given him after appearing as commanded. The vagueness of the indictment in this respect was challenged in the petitioner's motion to quash. (APPENDIX for Appellant's Brief in CCA-4, page 3) The undisputed evidence shows that the petitioner is not guilty of failure to report for induction. The evidence shows that if he is guilty of any offense under the Act it is failure to submit to induction. He was illegally tried and convicted of failing to report. If this aberration in criminal procedure is allowed to stand, then a way has been found to circumvent the fundamental guarantees written into the Bill of Rights concerning rights of defendants in criminal cases.

The error of the holding can best be shown by stating a hypothetical case. Assume that a person is charged with burglary of a store, which is an offense distinct from theft.

Suppose the proof showed that the culprit entered the open door of the store and stole some personal property by "shoplifting" and absconded. Under the specious and factitious holding of the court below such a person, although the undisputed evidence showed he was not guilty of burglary but guilty only of theft, could be convicted of burglary. Such a situation is contrary to the spirit of the Constitution and the genius of criminal procedure in the law.

In this respect the holding of the court below is in conflict with applicable decisions of this court and is such a drastic departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Moreover, the question of whether the offense of failure to report includes the offense of failure to submit to induction is an important question of federal law which has not been, but should be, settled by this court.

The court below stated that this court approved *United States* v. *Collura*, 139 F. 2d 345 (CCA-2, 1943), by citing that decision in *Billings* v. *Truesdell*, 321 U. S. 542 at 547, and then the court below declares that the *Collura* case supports the conclusion reached by it. The *Collura* case was *not* approved by this court. No petition for a writ of certiorari was filed in that case. It is cited in the *Billings* case only for the proposition that one who refuses to be inducted is equally as guilty of violating the Act as one who refuses to report for induction. But in the *Collura* case it was not held that the two offenses were the same, or that refusal to submit to induction was included in the offense of failure to report. Furthermore, the *Collura* case is entirely distinguishable from the facts of this case.

Collura did not complete the "connected series of steps into the national service which begins with registration" and which "does not end until the registrant is accepted by the army, navy, or civilian public service camp." (*Falbo* v. *United States*, 320 U. S. 549, 553) In other words, Collura

was not examined. He did nothing but appear and refuse to go through the physical examination. He did not have the opportunity to refuse to submit to induction as did the petitioner here, who completed the selective process and who refused to submit to induction after reporting at the induction station.

What is here said about the *Collura* case also applies to *United States* v. *Longo*, 140 F. 2d 848 (CCA-3d 1944). Longo was indicted for failure to report for a medical examination at the medical examination center. He appeared at his board and refused to go further. He left a letter with his board explaining his reasons for his failure to appear at the medical examination center.

The court below decries the position taken by petitioner by saying: "Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board." These arguments are not in the slightest degree inconsistent.

In the first place, petitioner cannot be convicted for failure to appear at the board because it is proved he intended not to appear. Proof of intent is not proof of the overt act. There was no overt act because he was in restraint at the time, so manifestly he could not be guilty of failure to appear at the board. Intent not to appear does not prove failure to appear where undisputed evidence shows he was in restraint.

In the second place, the defendant could not be convicted of violating the Act for failure to appear at the board for the purpose of being transported to the induction station when he, in fact, appeared at the induction station and took the physical examination voluntarily, refused to take the oath, returned to the camp after a 21-day furlough, and thus voluntarily completed the selective process after intending

not to report and being taken, against his will, to the induction station. If he could be convicted for failure to appear at the local board and also for failure to submit to induction, then he can be found guilty of two crimes, which allows his being twice put in jeopardy for the same act or omission.

If these two arguments are inconsistent, then also, and for the same reasons, are the arguments of the court below that the petitioner was guilty of failure to report because he (1) refused to submit to induction, and (2) failed to appear at the local board. Moreover, the alternative position of petitioner was made necessary by the inconsistent position taken by the Government, championed by the court below, that petitioner was guilty of failure to report regardless of his reporting at the induction station.

The discussion of the court below that the administrative remedies are not exhausted upon completion of the selective process is sufficient ground for granting the writ of certiorari. The holding is upon an important federal question which has not, but should be, settled by this court. Furthermore, on this point the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. The discussion under "Reasons Relied on for Allowance of Writ" in the petition for writ of certiorari in *Rinko* v. *United States*, No. 1071, October Term 1944, at pages 17 to 24, is applicable here. Accordingly that discussion is referred to and made a part hereof as though copied at length herein. Furthermore, the holding of the court below on this proposition is inconsistent with the dictum of this court in *Billings* v. *Truesdell*, 321 U. S. 542, at 558 and 559, where it is said that if a registrant who reports to exhaust his remedies is forced to submit to induction it would make a trap of the *Falbo* decision. Although the court below relied upon part of this language of the *Billings* decision as authority for its conclusion, it is to be observed that it studiously avoided that

part of the quotation about making a trap of the *Falbo* decision. The court employed ellipsis marks (* * *) for that part of the quotation.

What was the "trap" which this court spoke of in the *Billings* opinion? Inexorably, it appears to be submission to induction as a condition precedent to judicial review after completion of the selective process which is the "trap" there mentioned. Indeed, if it is not then he who appears to exhaust his remedies is worse off than he who stays away entirely.(*Cf.* Ex parte *Young*, 209 U. S. 123, 147; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

The court below says that this court, in *Falbo* v. *United States*, 320 U. S. 549, adopted the view that the only right of review of an illegal draft board order was by habeas corpus after induction. It is significant that the court below does not quote any such language in the *Falbo* opinion that would fairly justify this inference. This court has never held that the only right of review of an illegal draft board order is by habeas corpus after induction. The *Falbo* decision disposed of only the "narrow question" presented, namely, "Is judicial review of the legality of the order available as a defense to the indictment where the administrative procedure (or "selective process") has not run its course?"

The concurring opinion of Mr. Justice Douglas in *Hirabayashi* v. *United States*, 320 U. S. 81, 108, 109, throws no light on the holding in the *Falbo* case which was decided long after the *Hirabayashi* case. Moreover, the recognition of the line of decisions holding habeas corpus after induction as the only remedy does not constitute an approval thereof. The argument that habeas corpus after induction is the only remedy is based on the decisions under the 1917 Act which was essentially different from the 1940 Act. The very purpose of the Bone amendment to the 1940 Act was to keep registrants with claims for exemption and controversies with draft boards, and who desired to test the ille-

gality of the action of the boards, entirely out of the armed forces. History under the 1917 Act shows habeas corpus frustrated training.

The argument of the court below perverts the present Act into the form of the 1917 Act by an illegal construction, which is reading into the present Act something that is not to be found in the Act, and which is contrary to the genius of the Bone amendment.

The decision of this court in *Yakus* v. *United States*, 321 U. S. 414, 427-430, is relied upon by the court below as supporting its contention that submission to induction is required to complete all "administrative remedies" by applying for a writ of habeas corpus. The *Yakus* decision is distinguishable because there it was provided in the Act that one dissatisfied with an OPA ruling could appeal to the Emergency Court. In this Act there is no such provision and since habeas corpus is a judicial remedy and is not provided for in the Act as an "administrative" remedy it cannot be argued that the *Yakus* decision is in point. Naturally, if the Act provided for the registrant to appeal to the Emergency Court after appealing to the highest official in the Selective Service System, he must exhaust such remedies. There is no such remedy available here and the *Yakus* decision can be put aside.

It should be observed that the holding of this court in the *Yakus* case was assaulted as an aberration by the Select Committee to Investigate Executive Agencies of the Congress of the United States. (Second Intermediate Report of the Select Committee to Investigate Executive Agencies, H. R. 862, 78th Cong., 1st Sess., p. 5) Moreover, the Congress, by construction of the Price Control Act, remedied the predicament in which this court placed such persons. (See P. L. 383, 78th Cong., 2d Sess., sec. 107.) See VIRGINIA LAW REVIEW, Vol. 31, No. 1, Dec. 1944.

WHEREFORE your petitioner prays that this court issue a writ of certiorari to the Circuit Court of Appeals

for the Fourth Circuit directing such court to certify to this court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or in the alternative the judgment be reversed and the cause remanded for a new trial not inconsistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this court may seem just and proper in the circumstances.

LOUIS DABNEY SMITH, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

The points of law pertaining to the right of the petitioner to show in defense to the indictment that the administrative order is void because the selective process has ended, thus completing the administrative remedies, have been fully discussed in *Rinko* v. *United States,* No. 1071, October Term 1944. See Petition for Writ of Certiorari, pages 25-34, incorporated herein by reference as though copied at length herein.

ADDITIONAL ARGUMENT

ONE

The trial court erred in overruling motion for dismissal and for directed verdict because petitioner's failure to report to his local board at the time specified in the order was immaterial in light of the conceded fact that he subsequently appeared at the induction station, joined with the group of inductees sent there from his local board, submitted to the final physical examination, was accepted by the armed forces and was granted a furlough and subsequently court-martialed for failure to perform military duty.

It will not be disputed that petitioner appeared at the induction station, joined with his group of inductees, was physically examined and declared acceptable for military service and, despite his protests against being inducted into the army, was advised that he was a member of the armed forces, and was given the customary furlough. Petitioner's local board was immediately notified that he had so reported to the induction station and was protesting against his classification and the order of induction. It is highly significant that the local board did not then complain of the fact that petitioner had not reported to the local board as specified in the induction order but assented to the induction proceedings then taking place. It is further significant to note the words of Judge Wyche in his opinion refusing to discharge petitioner from the army on his petition for writ of habeas corpus: "The object of the order to report was to get him to the Induction Station. He was there when the board received the telephone call from Sergeant Lanier about his classification. Nothing further remained for the board to do in connection with his de-

livery." It cannot be disputed, therefore, that the administrative process that necessarily precedes induction had entirely run its course when petitioner reported at the induction station and was accepted on physical examination by the armed forces. As Judge Wyche pointed out, "Nothing further remained for the board to do." Its function and authority had been completely exhausted.

Notwithstanding the circumstances that the above facts are conceded, the Government has indicted petitioner not for his failure to subscribe to the oath of induction and to be inducted, but for his failure to report at the local board as specified in the order of induction. Whether or not petitioner did report at the local board at the time specified was the sole issue submitted to the jury and is therefore the basis of petitioner's conviction here complained of. The novel and important question is therefore squarely presented, viz., whether or not petitioner's failure to formally report at the local board, as ordered, constitutes a violation of section 11 of the Act when it also appears that he reported to the induction station and, with the knowledge of his local board, proceeded to submit to final physical examination.

Under the Act, failure to report is one offense and refusal to submit to induction is another offense, both of which are created by, and punishable under, section 11 of the Act. In *Billings* v. *Truesdell*, 321 U. S. 542, 554, 557, the Supreme Court held that "induction follows acceptance and is a separate process. . . . It must be remembered that Sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or rules or regulations made pursuant thereto.' . . . He who reports to the induction station but refuses to be inducted violates Sec. 11 of the Act as clearly as one who *refuses to report at all.*" [Italics added] Thus it is clearly settled that the reporting is complete when selectee is physically present at the induction station

at the proper time. In fact, in this case petitioner did more than report. He went through to the end of the selective process by submitting to the examination. Clearly he cannot be tried for refusing to submit to examination, but if this conviction is allowed to stand, he *could* so be tried. The fact that he subsequently refused to be inducted is not admissible evidence in support of this indictment because such circumstance has no probative value as to determining whether he reported or did not report because that is a separate process and hence a separate offense under the Act. There is no escape from that conclusion. He should have been indicted for failure or refusal to submit to induction, if he was to be tried for any offense under the Act.

What the court actually did was to permit a conviction for failure to *report* to be made upon proof that he refused to *submit* to induction, an entirely different offense. It may be argued that this is technical. It may be, but it is also practical and meritorious. The rule requiring an indictment for a felony is also technical as are all rules of law. The practical result of this action of the court will be that, should the conviction be allowed to stand, he can then be indicted for the offense of failure to submit to induction which will result in two convictions for the same act, viz., failure to submit to induction.

Under the Act there are a number of things which selectees are required to do, or duties they are required to perform, the refusal to perform any one of which is a criminal offense, but it is submitted that before a conviction can be lawfully secured the particular violation charged must be alleged and proved. In any event petitioner cannot be convicted where one violation is alleged and another proved.

During the trial, petitioner raised the objection that he was not obliged to testify with respect to his refusal to submit to induction on the ground that such was a separate offense not included in the indictment and that he could not be compelled to give evidence that would tend to in-

criminate him. However the trial court overruled his objection. In so doing, the trial court erred, because, in a prosecution for the one offense of failure to report, petitioner should not have been forced to incriminate himself as to the separate offense of refusing to submit to induction. When a man is being tried for larceny and goes on the stand in his own defense to testify he cannot be forced to admit that he was guilty of bigamy or murder. He may be cross-examined about the offense for which he was being tried, but no witness is ever required, under the Constitution, to answer a question that will incriminate him for another offense. One who takes the stand in his own defense should not be required to give evidence which would tend to convict him of a crime other than the one for which he is being tried because, by taking the stand, he does not waive that right: he only waives the right to remain silent as to the crime for which he is being charged.

Even if it be conceded that, in the interest of good order and proper conduct, it was petitioner's duty to report to his local board so that orderly transportation to the induction station could be given him, as provided by the Regulations, nevertheless, in view of the seriousness of the criminal penalties attached to violations of the Act, the courts will not close their eyes to the conceded fact that petitioner did report at the induction station and there join with the group that was sent from the local board. Thus, in no way was the Selective process impeded or hindered. Petitioner's failure to report at the local board did not jeopardize the public welfare. It was only an incidental and perfunctory step designed to get him to the induction station to complete the selective process. (See Section 633.2 and 633.6 for description of the procedure at the local board.) Following the reasonable and strict construction placed upon penal statutes, petitioner submits that section 11 of the Act should not be expanded into a dragnet for small and inconsequential infractions of the Selective Service

Regulations. Thus it was that the Supreme Court, in *Bartchy* v. *United States*, 319 U. S. 484, 488, reversed the conviction of a registrant who had failed to follow the strict requirement of the letter of the regulations concerning advising the board of his mailing address. The court held that the requirements of the law were "satisfied when the registrant in good faith" made a reasonable attempt to comply with the spirit of the law.

It is not contended that registrants have the right to disregard or flout the reasonable requirements of the Selective Service Regulations, for to do so would be to destroy the efficiency of the System. Nevertheless the court in administering such a severe penal law will exercise restraint and caution in sentencing citizens for minor infractions that are shown to be entirely harmless errors. The spirit of the Act does not call for nor permit such a harsh construction. The circumstances of this case are such that justice requires the application of the principle of estoppel. Had petitioner's act in failing to report at the local board been of such serious culpability as to warrant the judgment that has now been imposed upon him, it would have been the reasonable and proper duty of the local board to have advised the army officer at the induction station that petitioner had already violated the Act and that the induction process should not proceed until that matter had first been settled. However, when petitioner's presence at the induction station was reported to the local board, it voiced no objection whatever to the induction process proceeding, but, instead, indicated to the army officer that the petitioner was properly at the induction station.

The very fact that the local board was willing for the inductive process to proceed and maintained silence on the irregularity of the petitioner's failure to report at the local board, constitutes a waiver of such irregularity. As stated in 67 *Corpus Juris* 291-293, "A waiver occurs when one in possession of any right, whether conferred by law or con-

tract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it." If this were not true, it would enable Selective Service boards to lay a trap for registrants. Some minor irregularity might take place in the Selective Service process and later, even though the registrant might long since have been inducted into the armed forces, the local board could resurrect this irregularity and demand prosecution of the registrant for failure to comply with the strict letter of the law.

Thus waiver has also been defined as a neglect or omission to insist upon a matter of which a party may take advantage at a time when it ought to be done so that it may operate as a trap to the other party to insist upon it afterwards. The failure to register timely objection implies consent. 67 *Corpus Juris* 293.

Any irregularity was thus specifically waived by the local board and the substance of criminal liability effectively erased. Therefore, the motion for a directed verdict should have been granted. Because of the court's failure to grant the motion for directed verdict, the judgment should be reversed and the indictment ordered dismissed.

TWO

The trial court erred in overruling motion for dismissal and for directed verdict because the conceded fact that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report to the local board for induction constituted a valid defense to the indictment charging him with criminal failure to appear at the local board.

The evidence shows that petitioner was kidnaped by three state law enforcement officials and falsely imprisoned by them at the very hour he was scheduled to report to the

local board for transportation to the induction station. Regardless of petitioner's own intentions, it was physically impossible for him to appear at the local board. He was arbitrarily taken to the induction station against his will, where, by that time, the induction proceedings were ready to begin. At no time did petitioner have opportunity to report to the local board.

Realizing the force of this element in the case, the Government seeks to show that petitioner had no intention of reporting to the local board anyway, and such emphasis has been placed on this feature of its case. These circumstances pose a fundamental problem of criminal law. Can a citizen now be convicted for merely expressing an intention to violate the law? Certainly if this rule be upheld, then the effect is that conspiracy proceedings, the federal prosecutor's favorite instrument, has been substantially simplified so as to allow convictions in cases of "one man conspiracies".

There are many circumstances that might reasonably arise which would prevent a registrant from reporting to his local board at the precise hour and minute prescribed. He might meet with an accident, he might be delayed for some unavoidable reason, or have some other equally valid excuse. If the Government's contention be upheld, these defenses are immaterial, and the one question allowed to go to the jury is whether, as a matter of fact, it is true that the petitioner failed to report as specified in the local board's order.

This unreasonable and arbitrary view of law has been definitely rejected by the courts. In the case of *United States* v. *Hoffman* (CCA-2) 137 F. 2d 416, 421, the defendant was late in reporting to his draft board for transportation to the induction station. He contended that circumstances at his home unavoidably caused his delay and that he desired to comply with the law. The evidence in that case showed that defendant had made certain statements indicating an

intention to disobey the order for induction. The court held, however, that he could not be convicted merely on the expression of his intent but that the overt act of refusing to be inducted should be the element of criminal guilt. "While this matter was evidential of what his intent was on induction day, guilt would not be established unless he did refuse to be inducted." The court found that Hoffman had not refused to be inducted and that such inference could not be drawn from his conduct.

In the instant case, although petitioner did refuse to take the oath of induction, he has not been indicted for his delinquency in this respect but solely because he "failed, neglected and refused to REPORT FOR INDUCTION as ordered by said local board". The court is limited to the indictment. He cannot be convicted for his failure to take the oath because he is not indicted for that offense. Neither can he be convicted for failing to report for induction, because the undisputed evidence shows that he did report. The benefit of the *Hoffman* case is derived from the court's holding that his INTENT not to report cannot be made the ground for conviction.

In *United States* v. *Grieme* (CCA-3) 128 F. 2d 811, 815, the same principle was recognized, the court holding that "any matter exculpatory of the defendants would be such as indicates their lack of intent to disregard the board's order, e. g., if the board failed to send the registrants' notice to appear or if the registrants did not receive the notice through no fault or neglect of their own."

The act made criminal by section 11 of the Selective Training and Service Act is that of 'knowingly failing or neglecting to perform a statutory duty'. (50 U. S. C. App. sec. 311) Since the case is to be judged not by the terms of the indictment but by the terms of the statute, the legal issue must be confined to a determination as to whether or not the evidence shows that petitioner did knowingly "fail or neglect to perform a statutory duty". As said in *United*

States v. *Trypuc* (CCA-2) 136 F. 2d 900, 901, "Not every failure to perform a duty imposed by the statute or regulations is made criminal. Only a person 'who shall knowingly fail or neglect' his duty is to be punished."

The situation is not unlike that presented in *Mackey* v. *United States* (CCA-6) 290 F. 18, 21. There a postmaster was indicted for embezzlement for his failure to remit certain funds to the Post Office Department within a specified time. There, as here, the Government contended that his failure to remit the money in strict accordance with the statute constituted a criminal act, "regardless of the fact that such failure might have been occasioned by sudden illness, injury, larceny, destruction of funds, or other causes for which the postmaster ought not to be held criminally responsible." Of course, this contention was rejected by the court on the ground that there was no evidence tending to prove "an intentional and criminal refusal on the part of the defendant other than his failure to make remittances in accordance with the requirement of the Post Office regulations."

The injustice of sentencing a man to a long prison term for 'failing and neglecting' to perform a statutory duty, where performance was impossible due to some extraneous circumstance, is patent. This court has very carefully reviewed and defined the import of the hackneyed legal expression 'fail and neglect' as used in criminal statutes in the case of *Hackfeld & Co.* v. *United States*, 197 U. S. 442, 448, holding that the term usually is intended to express carelessness or lack of attention in doing a given thing. There the court was construing a statute requiring a shipmaster to cause the return of an immigrant illegally entered into the country. Said the court: "If by this requirement, it was intended to make the ship owner or master an insurer of the absolute return of the immigrant, at all hazards, except when caused by *vis major* or inevitable accident, it would seem that Congress would have

chosen terms more clearly indicative of such intention. . . . Where the statute permits of a construction which does not require the absolute insurance of the return of the immigrant but holds the ship owner to the care and diligence required by the circumstances, we do not feel inclined to adopt the construction least favorable to the accused. This statute imports a duty and, in the absence of a requirement that it shall be required at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed."

The Government has pointed to no words in section 11 of the Act that would form basis for holding that a registrant is liable at all hazards to punctually comply with every order of the local board. This being a highly penal statute, the test above announced in the *Hackfeld* case should be adhered to. Since petitioner was kidnaped and physically restrained at the very time he was scheduled to report to the local board, it would be the grossest injustice to withhold this issue from the jury and submit the case just as if petitioner had been free to report if he wished. So to do would be against the plain and imperative import of the words 'fail and neglect' implying a condition of carelessness and lack of regard for the requirements of the law. Under the conceded facts, that element is not in this case. Petitioner's failure to appear at the local board at the time specified in the order was not shown to be due to his carelessness or disregard for the law, but was the direct result of his false imprisonment and unlawful arrest. The actual and threatened exercise of legal power possessed and believed to have been possessed by the magistrate and the two constables from which petitioner had no means of resistance or relief, compelled him to submit to their custody. *Rabich* v. *Hutchins*, 95 U. S. 210, 213; *Gar Scott & Co.* v. *Shannon*, 223 U. S. 468; *Riley* v. *United States*, 15 F. 2d 314. Petitioner had the choice of submitting to the unlawful arrest or resisting it and suffering the possible consequences. The

fact that a choice was made not to resist the unlawful arrest does not change the fact that it was still false imprisonment, because petitioner had violated no law.

The situation presented here is analogous to that encountered in the field of domestic relations. A court may order a man to provide regular monthly support for his wife. It is conceivable that a man may neglect to make the regular monthly installment and be brought before the court to show cause why he should not be committed for contempt. It would certainly be conceded that he would have the privilege of showing, in defense of his action, that some extraneous circumstances made it physically impossible for him to comply with the court's order, even though he may have declared that he would not pay even if able so to do. If he had been injured, imprisoned or had become penniless and for such reasons was unable to pay the regular monthly installment, this fact should be a complete defense to the charge. Likewise, in this case, such exculpatory circumstances should have been submitted to the jury.

It has been held that a registrant's good faith and lack of criminal intent in committing certain acts cannot be urged as defense under section 11 of the Act because there the word "wilfully" is not used. Since only the word "knowingly" is used, the courts have held that good faith and honest belief on the part of a defendant in committing certain acts are immaterial as a defense to an indictment charging a violation of the Act. *United States* v. *Madole* (CCA-2) 145 F. 2d 466, 467; *Baxley* v. *United States* (CCA-4) 134 F. 2d 937. In the latter case this court said, "One is criminally responsible who does an act that is prohibited by a valid criminal statute though the one who does this act may do so under a deep and sincere religious belief. But the doing of the act was not only his right but also his duty." If, therefore, *good intent* on the part of the petitioner is no *defense* to an indictment charging a violation of the Act, then a *bad* intent to violate the Act is *no*

offense. Such element is immaterial. It was error to let the jury consider it in determining guilt. Justice, which excludes the element of petitioner's good faith in performing certain acts, at the same time denies the Government the right to submit to the jury the element of petitioner's bad faith as bearing upon his guilt under the law.

If the defense of good intent is ruled out, by the same token and in the same measure the latter cudgel of the Government must be likewise restrained and the issue presented to the jury solely on the question as to whether or not petitioner knowingly failed or neglected to perform a statutory duty. Therefore the Government's case finds no support or refuge in the alleged circumstance that, in view of petitioner's expressed intention, he would not have reported to the local board had he been given the opportunity. How can this court or the jury say what petitioner might have done had he not been kidnaped and been physically restrained at the crucial time? In a criminal proceeding of the magnitude here involved there is no room for speculation or conjecture as to what might have occurred, because petitioner can only be sentenced for his overt acts.

The failure to grant the motion for a directed verdict upon these points raised by the evidence showing the impossibility of petitioner's appearing at the local board, constitutes reversible error of the court below. The judgment should be reversed and the indictment ordered dismissed.

THREE

The trial court erred in charging the jury that petitioner's appearance at the induction station and acceptance by the armed forces, as well as petitioner's contentions that he was falsely imprisoned, were immaterial and in refusing the requested charges which properly presented these issues to the jury.

In the discussion appearing under the foregoing two points in this argument, it has been established that the trial court erred in overruling petitioner's motion for dismissal and a directed verdict which was urged on the ground that the undisputed evidence showed that he was not guilty in that he had reported to the induction station and had there taken all steps necessary to exhaust his administrative remedies, and on the further ground that he was kidnaped and falsely imprisoned at the time he was scheduled to report to the local board. However, the court's error is not limited to its denial of this motion. Even if this court should decide that the state of the evidence was not sufficiently clear in petitioner's favor to justify the trial court's granting the motion for dismissal and directed verdict, then it should at least hold that these defenses were legitimate questions for submission to the jury, and that it was reversible error for the trial court to instruct the jury to disregard the fact that (1) petitioner had appeared at the induction station with the knowledge of his local board, (2) petitioner had been accepted on final examination by the armed forces, and (3) petitioner had been kidnaped and was falsely imprisoned at the time he was scheduled to report at the local board as directed in the induction order. This charge amounted to an instruction to the jury to find petitioner guilty. Moreover, the court erred in refusing the requested charges that presented each

of these elements to the jury for their consideration in determining whether the petitioner was or was not guilty as charged. All petitioner's legitimate defenses were kept from the jury, whose province it was to determine these vital questions of fact. This circumstance alone requires a reversal of the case for a new trial.

Conclusion

It is submitted that this case is one calling for the exercise by this court of its supervisory powers under the Judicial Code and the Rules of this court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia.

(Argued March 12, 1945. Decided April 4, 1945)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Hayden C. Covington (Curran E. Cooley and Grover C. Powell on brief) for Appellant, and Louis M. Shimel, Assistant U. S. Attorney; Irving S. Shapiro, Attorney, Department of Justice, and Henry H. Edens, Assistant U. S. Attorney, (C. N. Sapp, U. S. Attorney, and Nathan T. Eliff, Special Assistant to the Attorney General, on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from a conviction and sentence under an indictment charging violation of the Selective Training and Service Act of 1940, 50 USCA Appendix sec. 301 et seq., in failing to report for induction pursuant to the order of a local draft board. Defendant is a member of the sect known as Jehovah's Witnesses and claims exemption from the provisions of the Act on the ground that he is a minister of religion. This claim was denied by the local board and he was classified 1-A and ordered to report for induction. The appeal presents two questions: (1) whether the trial court erred in refusing to direct a verdict for defendant on the facts relating to the refusal to report, and (2) whether the court erred in excluding evidence as to the ministerial status of defendant. Both questions, we think, must be answered in the negative.

The facts with respect to defendant's failure to report are as follows: Defendant was ordered by the draft board to report to the board at its office in Columbia, S. C., for induction at 8:30 A.M., September 30, 1943. He made up his mind not to report and so notified his father, who was anxious that he report and be inducted. His father arranged with a state magistrate and two local officers to take defendant by force and carry him to the induction center at the time fixed for induction. On the morning of September 30th, defendant, who lived two miles from the office of the board where he was required to report, was making no effort to report but, between 8 and 8:30 in the morning, was at his home engaged in shaving, and intending thereafter, not to report to the draft board, but to a United States Commissioner and explain why he had not complied with the board's order. While he was so engaged, the magistrate and officers who had been employed by his father arrived at his home and by a show of force compelled him to go with them to the induction center at Fort Jackson

near Columbia, S. C., where they turned him over to the officers of the army charged with the duty of inducting draftees. Defendant notified these officers that he was a minister of the Gospel and that he refused to be inducted into the army. He was finger printed and examined by them, but refused to take an oath or go through the induction ceremony, protesting throughout the proceedings that he would not be inducted.

At the conclusion of the induction ceremony in which other draftees participated, defendant was notified that he was in the army, notwithstanding his refusal to be inducted. He was granted a three weeks leave along with the other draftees and was ordered to return to Fort Jackson three weeks later. He returned in accordance with this order but refused to put on the army uniform or obey orders. He was tried by a court martial for disobedience of orders and sentenced to a term of imprisonment but, after the decision in *Billings* v. *Truesdell*, 321 U. S. 542, was released on habeas corpus. He was then indicted in the court below for failure to report for induction as ordered by the draft board.

Upon the facts as stated, there was no error in refusing to direct a verdict of not guilty; for defendant was guilty, on his own admissions, of failing to report for induction as ordered by the board. Not only does he admit that he did not intend to report and remained at home when he would necessarily have been on his way to the board's office if he had intended to comply with its order, but also that, after he had been forcibly carried to the place of induction, he persistently maintained an attitude of defiance and repeatedly stated that he would not be inducted. To report for induction means to present oneself not only at the appointed place but also in readiness "to go through the process which constitutes induction into the army." *United States* v. *Collura*, 2 Cir. 139 F. 2d 345, approved in *Billings* v. *Truesdell*, 321 U. S. 542 at 557. Certainly one who has

made up his mind not to report for induction and who, after having been dragged by force to the induction center, persistently refuses to go through the process of induction, cannot be said to have reported for induction as ordered by the board, within any possible meaning that can be given to that language.

Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board. A forcible seizure which made it impossible to comply with the board's order would doubtless be a defense; but nothing of the sort is involved here. The seizure made it, not impossible, but possible, for defendant to comply; and, with the opportunity for compliance at hand, he failed to avail himself of it. Likewise, presence at the induction center, rather than at the board's office, would doubtless be sufficient compliance on the part of one who was attempting to comply with the order to report for induction, but not on the part of one who had been carried there against his will and who, being there, persistently refused to be inducted. One ordered to report for induction who presents himself at the place designated with the statement that he does not intend to be inducted at all, can hardly be said to have reported for induction. A fortiori, one who is present at the place of induction only because he is carried there by force, and who defiantly refuses induction throughout the period of his presence, cannot be said, in any reasonable sense, to have reported for such purpose. This should be so obvious as not to require statement.

Directly in point is the decision of the Second Circuit in the case of *United States* v. *Collura, supra,* cited with approval by the Supreme Court in *Billings* v. *Truesdell, supra.* In that case, where the charge was failure to report

for induction, the draftee appeared at the induction station at the appointed hour but stated that he refused to be inducted unless given a guarantee against compulsory vaccination. In affirming a conviction the court said, 138 F. 2d at 345:

"Obviously the duty to report for induction means more than putting in an appearance at the induction station. The selectee must not only appear but must be ready to go through the process which constitutes induction into the army. Admittedly the appellant did not report for induction, but reported for the purpose of making a bargain with the military authorities and entering the army only if the terms agreed upon were satisfactory to his personal views as to vaccination."

In the case at bar the draftee did not report for the purpose of making a bargain with the military authorities as a condition of induction. He did not report at all. He was forcibly taken to the induction station and, being there, refused unconditionally to be inducted. See also *United States* v. *Longo*, 3 Cir. 140 F. 2d 848.

On the second question, we think it clear that the trial court was correct in excluding evidence as to the alleged ministerial status of defendant and refusing to charge the jury with regard thereto. Whether the defendant was entitled to exempton from military service or not on the ground that he was a minister of religion, this was a question of fact committed to the determination of the draft board, with appeal to the appeal board and in a limited number of cases to the President, but with no provision for review by the courts. *United States* v. *Grieme*, 3 Cir. 128 F. 2d 811, 814-815. It was his duty to comply with the board's orders; and, in a prosecution for failure to do so, no defense based on the invalidity of the orders can be entertained. *Falbo* v. *United States*, 320 U. S. 549. Compliance with the board's orders includes submitting to induction, which is the last step in the process leading to induction;

for "the order of the local board to report for induction includes a command to submit to induction." *Billings* v. *Truesdell*, 321 U. S. 542, 557. As said by the Supreme Court in the case last cited:

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board. It must be remembered that sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.' He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura, supra. The order of the local board to report for induction includes a command to submit to induction.* Though that command was formerly implied, it is now express. The Selective Service Regulations state that it is the 'duty' of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and *'to submit to induction.'* (Italics supplied.)

Defendant argues that he has exhausted the administrative process, as required by the *Falbo case*, when he has submitted to physical examination and been accepted by the military authorities, and that it is then open to him, if charged with refusal to obey the board's order with respect to the final matter of submitting to induction, to attack the validity of the order by showing that the board had classified him unreasonably. The trouble with this position is that the administrative process is not exhausted until the order of the board is complied with, which, as we have seen, embraces submitting to induction. When the *Billings case* is considered in connection with the *Falbo*

case, there can be no question as to the correctness of this conclusion. In the *Billings case*, the court, after using the language which we have quoted above, goes on to say:

"Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts: . . . These considerations together indicate to us that a selectee becomes 'actually inducted' within the meaning of sec. 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Following the procedure prescribed thus embraces undergoing induction; and not until this has been done may the legality of classification be challenged. *United States* v. *Rinko*, 7 Cir. 147 F. 2d. 1; *United States* v. *Flakowicz*, 55 F. Supp. 329, Aff. 2 Cir. 146 F. 2d 874. The inductee may, of course, apply for habeas corpus as soon as his induction into the army is completed, and need not wait until he is court-martialed for disobedience of military orders.

This court was of opinion when the cases first arising under the Act came before us that the invalidity of an order of classification arising from the denial of due process might be asserted as a defense to a prosecution for failure to obey the order. See *Baxley* v. *United States*, 134 F. 2d 998, 999; *Goff* v. *United States*, 135 F. 2d 610. A different view, however, had been taken by the Circuit Court of Appeals of the Third Circuit in *United States* v. *Grieme*, 128 F. 2d 813, 815, where that court said:

"We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the

board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts."

In the *Goff case, supra*, we expressly referred to the *Grieme case*, and, in justification of not following it, said: "It would seem . . . that the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order." The Supreme Court, however, in the *Falbo case*, after referring to the conflict of view between the *Goff* and *Grieme cases*, adopted the view of the latter; and in his concurring opinion in *Hirabayashi* v. *United States*, 320 U. S. 81, 108, 109, Mr. Justice Douglas referred to the rule of the *Grieme case* as settled law, saying: "There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act *and to refuse or fail to be inducted*. He must submit to the law. But that line of authority holds that after induction he may obtain through habeas corpus a hearing on the legality of his classification by the draft board." (Italics supplied.) If habeas corpus is the remedy by which the validity of classification is to be tested, then, unquestionably, submission to induction is a necessary part of the preliminary process; for not until the inductee is actually in the army is he deprived of his liberty so that habeas corpus will lie.

In the *Goff case* we were impressed with the thought that the validity of an order might be challenged wherever failure to comply with it was alleged. The Supreme Court has taken the view, however, that considering the dangers which might flow from delay in time of war, a reasonable interpretation of the Selective Service Act requires that orders of the draft board be complied with and all admin-

istrative remedies thereunder be exhausted before they may be challenged in the courts. This is in accord with the holding that the validity of OPA regulations may be challenged only after administrative procedures have been exhausted, and then only in a particular court. Cf. *Yakus* v. *United States*, 321 U. S. 414, 427-430. Among the advantages in cases such as this of limiting the remedy of the draftee to habeas corpus proceedings commenced after the administrative process has been completed, is that unnecessary delays in the raising of the army are avoided and questions which are primarily constitutional in character are heard before a judge without the distractions and uncertainties likely to accompany a criminal jury trial. Constitutional rights of citizens must, of course, be preserved in war as well as in peace; but the procedure outlined in the *Falbo* and *Billings* cases enables the courts to preserve them without unduly interfering with the war effort.

An additional reason for sustaining the action of the trial court is that there was nothing tendered by defendant sufficient to show such a denial of due process as would result in invalidity of the draft board's order. It was certainly for the board to say whether a college student eighteen years of age, majoring in engineering, and claiming to be a minister of religion merely because he distributed Bible literature and conducted Bible studies, was a minister of religion within the meaning of the Selective Service Act. See 53 F. Supp. 583-584. The decision of the board was affirmed by the appeal board and by the President; and there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. Even if the rule of the *Goff case* be applied, therefore, there was no error; for it must be remembered that, with respect to the right to assert the invalidity of the board's order as a defense, we said in that case: "This does not mean that the court in a criminal proceeding may review the action of the board. That action is to be taken as final, notwithstand-

ing errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right."

There was no error and the judgment appealed from will be affirmed.

Affirmed.